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No. 80-186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT L. WRIGHT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether Petitioner has standing to challenge a presumption which was not applied against him and did not contribute to his conviction.

2.

Whether a federal question is properly presented for review by this Court when the highest court of the state rendered no opinion on the issue and the decision by that court might have rested upon a nonfederal ground.

3.

Whether the court-established presumption which only creates a rebuttable presumption concerning possession of contraband creates a classification subject to scrutiny under the equal protection clause of the fourteenth amendment.

I.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Robert L. Wright, and his wife, Cynthia Wright, were indicted May 29, 1979, in

Toombs County, Georgia, on two counts of violations of the Georgia Controlled Substances Act. Count One alleged possession of marijuana with intent to distribute, and Count Two alleged possession of cocaine. (R. 4-5). At the conclusion of a jury trial conducted on August 27-28, 1979, Petitioner and his wife were found guilty on both charges. (R. 4).

The evidence at trial showed that police officers entered the residence of the Petitioner and his wife pursuant to a search warrant the validity of which was unchallenged at trial. (T. 8-9). Both Petitioner and his wife admitted that they had resided at the premises since 1972. (T. 99). On entering the house, the police observed the Petitioner, his wife and a third party. The third party was later determined to be the brother of the Petitioner. The Petitioner's brother was observed smoking

marijuana at the time the police officers entered the home. (T. 27). Petitioner admitted that he had been smoking marijuana at the time of the police raid, although claiming that the marijuana belonged to his brother. (T. 110). Police officers also observed what appeared to be marijuana in an ashtray in the living room. (T. 53-54).

The police officers discovered an additional quantity of marijuana concealed under clothes in a chair in what appeared to be a child's bedroom. (T. 13-14). It was determined at trial that this room was normally occupied by the Petitioner's child, although the Petitioner's brother also slept in the room on occasion. In what was determined to be the master bedroom, the police officers discovered marijuana in plain view on top of the dresser. (T. 32-34, 40, 42). The officers

also discovered a set of metric scales in plain view on the dresser. Other items found on top of the dresser included a quantity of plastic bags and small brown envelopes, a tin can containing $1,399.00 and a cigar box containing $191.00. (T. 33-39). The officers discovered another box containing $1,688.00 in a chest of drawers in the same bedroom. (T. 48). A small spoon bearing a residue of cocaine was found in a closet in the bedroom. (T. 47).

An expert witness called by the State at trial identified the substances found in the house as being marijuana and the residues on the spoon as being cocaine. (T. 64). The total weight of the marijuana found was two pounds two point seven ounces. (T. 66-67). The cocaine residue measured one point five grams. (T. 66).

Petitioner and his wife testified that Petitioner's brother had lived in the house for approximately a month and a half. They further testified that he had a key to the house and that he alternately slept in the living room and in the child's bedroom.

The jury was charged on circumstantial evidence, presence at the scene, possession and the "equal access" doctrine. (T. 127-131). The jury returned verdicts of guilty on each count as to the Petitioner and his wife. On September 15, 1979, the court sentenced Petitioner to nine years on each count to run concurrently with five years to be served followed by four years on probation conditioned upon the payment of a $500.00 fine within six months of his release from prison. (R. 9). Petitioner's wife, Cynthia Wright, was sentenced to seven years on each count to run concurrently with three years to be served

followed by four years probation conditioned upon the payment of a $500.00 fine within six months of her release from prison. (R. 11). The motion for new trial was overruled. (R. 27).

Petitioner and his wife subsequently appealed to the Court of Appeals of Georgia. That court found that the Petitioner's brother had an equal opportunity to possess the marijuana found in the child's room; however, there was sufficient evidence to find that the Petitioner possessed the contraband found in the master bedroom. Wright v. State, 154 Ga. App. 400, 401, __ S.E.2d __ (1980). The court then determined that it was presumed that the contraband found in the master bedroom belonged to the Petitioner based on the presumption that contraband found in the home belonged to the head of the household. The court further noted that there was no evidence to link Petitioner's wife to possession of any of the

contraband. Wright, supra. The court thus reversed the convictions of Petitioner's wife, but affirmed the convictions of the Petitioner.

Petitioner filed a motion for rehearing in the Court of Appeals of Georgia. In this motion, Petitioner only argued that the court misapplied Georgia law, in particular, the "equal access" doctrine. Petitioner did not raise the constitutionality of the presumption at this time. The motion for rehearing was denied by the Court of Appeals of Georgia on April 24, 1980.

Petitioner filed a petition for a writ of certiorari in the Supreme Court of Georgia. In this application, Petitioner asserted for the first time, the question of the constitutionality of the presumption set out by the Court of Appeals of Georgia. The

Supreme Court of Georgia denied the application on May 28, 1980. The court denied the motion for reconsideration on June 9, 1980. A petition for certiorari was filed in this Court on August 7, 1980.

Further facts will be developed as necessary for a more thorough consideration of the issues raised by the present petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER DOES NOT HAVE STANDING TO ATTACK A PRESUMPTION WHICH DID NOT CONTRIBUTE TO HIS CONVICTION, BUT WAS ONLY RAISED ON DIRECT APPEAL IN REVERSING THE CONVICTION OF PETITIONER'S WIFE.

After evidence was presented to the jury, the trial court charged the jury on various points of law. At no time did the court charge the jury that the head of the household is presumed to be in possession of contraband found in the home. The court charged the jury as to reasonable doubt. The court also included a charge on direct and circumstantial evidence as well as the requirement that a case resting entirely on circumstantial evidence be inconsistent with any reasonable theory of innocence.

(T. 127). The court charged the jury on the "equal access" doctrine. (T. 129). The court also charged that merely finding contraband on the premises was not sufficient if it appeared that other persons had equal opportunity to commit the crime. After explaining the different offenses charged, the court explained what the law recognizes as possession. The court charged on actual and constructive possession, as well as sole or joint possession. (T. 131). The jury clearly determined that the evidence was sufficient to show possession on the part of the Petitioner.

On direct appeal to the Court of Appeals of Georgia, the presumption raised in the instant case was first mentioned in the brief filed on behalf of the Petitioner.[1]

1/ Petitioner and his wife filed a joint appeal with both being listed as appellants. Petitioner's counsel at that time was the same as the present counsel in this Court.

In the brief submitted on behalf of the Petitioner to the Georgia Court of Appeals, the following was stated:

> "The State contends that Robert L. Wright was the head of the household, which is not denied by him. Also it is well-settled that where contraband is found in a house, the presumption is that such contraband was possessed by the head of the household."

(Appellant's brief, 8).[2] Thus, the Petitioner freely admitted that he was the head of the household and admitted that the presumption existed that contraband in the house was possessed by the head of the household.

In ruling on the general grounds raised by the Petitioner and his wife, the Court of Appeals asserted the presumption first set out by the

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2/ The brief on behalf of the Appellants (Petitioner and his wife) is included in the record of the Court of Appeals of the State of Georgia. This quotation is from page eight of that brief, the second paragraph.

Petitioner. The court first set out this presumption in finding that Petitioner's brother did not come within this ruling. The court quoted the original case setting out this presumption and noted, "but such a presumption cannot be broadened to include all relatives who may be living in the same house with the defendant." Wright, supra at 401, quoting Harper v. State, 85 Ga. App. 252, 254, 69 S.E.2d 102 (1952). Thus, the court was not applying this presumption to the Petitioner, but was using this presumption to show that the "equal access" doctrine would apply as between the Petitioner and his brother. The court went on to note that based on the facts, that is, that many items serving as the basis for the conviction were found in the master bedroom and were not in "open, notorious, easily accessible areas," then this doctrine would not apply. Wright, supra at 401, quoting Kenerbler v. State, 137 Ga. App. 618, 224 S.E.2d 476 (1976). The

court found that the Petitioner's brother had equal opportunity to possess the marijuana found in the child's bedroom, but based on the admission by the Petitioner, the court could find that he possessed the contraband found in the master bedroom. The court then once again used the presumption to find that there was no evidence to link Petitioner's wife to possession of either the marijuana or the spoon bearing cocaine residue. Thus, the court used the presumption only to reverse the conviction of Petitioner's wife as there was no other evidence to support a conviction.

After the court found that there was no evidence to support a conviction of Cynthia Wright, and that there was evidence to show possession on behalf of Robert Wright of the evidence found in the master bedroom, the

court went on to find that there was additional evidence to support Petitioner's conviction. The court noted that mere possession of the contraband would not serve as a basis for conviction for possession with intent to distribute without additional evidence. Crider v. State, 98 Ga. App. 164, 105 S.E.2d 506 (1958). The court noted that Petitioner testified that the metric scale, plastic bags, coin envelopes and cash found on top of the dresser belonged to him. The court found that this would authorize the jury to find that the Petitioner possessed marijuana with intent to sell. Wright, supra at 402, citing Bell v. State, 35 Ga. App. 465, 134 S.E. 120 (1926).

It is clear from the holding of the Court of Appeals of Georgia and from the charge of the trial court, that the presumption challenged by the present petition was not applied

to the Petitioner at trial and in no way contributed to his conviction. The presumption was only used for the first time by the Court of Appeals after being mentioned by the Petitioner in his brief to that court. At that time, the presumption was not applied to uphold the Petitioner's conviction as he was found to have possession of the items based on other evidence. The presumption was only used to reverse the conviction of Petitioner's wife. Furthermore, Petitioner freely admitted in his brief to the Court of Appeals of Georgia that he was the head of the household. Thus, there was no need to apply this presumption to the Petitioner.

This Court continually held that it is bound by the requirements of a case in controversy and standing set out in Article III of the United States Constitution. Doremus v. Board of Education, 342 U.S. 429 (1952). The party

attempting to invoke the power of this Court must not only show that a law is invalid, but must show that he "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement. . . ." Massachusetts v. Mellon, 262 U.S. 447 (1923). In cases in which a particular statute was not applied to the individual seeking review by this Court, this Court has found that there is no standing to challenge the constitutionality of a state law. New York Civil Service Commission v. Snead, 425 U.S. 457 (1976).

Respondent submits that the Petitioner has not shown that he has standing to raise the constitutionality of the presumption raised in the present petition. It has been shown that the presumption was not applied to the Petitioner at trial. The presumption was applied on direct appeal to reverse the conviction

of the Petitioner's wife. The court did not apply it to the Petitioner because he admitted he was head of the household and there was other evidence linking Petitioner to the crime. Petitioner has not shown that he has sustained any injury as a result of the application of the presumption to his wife. Thus, the Petitioner has no standing to raise the issue of the constitutionality of the presumption in the instant case and this Court should decline to grant certiorari.

B. THE HIGHEST COURT OF THE STATE OF GEORGIA RENDERED NO OPINION ON THE ISSUE REGARDING THE PRESUMPTION CHALLENGED BY PETITIONER AND THE JUDGMENT OF THAT COURT MIGHT HAVE RESTED UPON A NONFEDERAL GROUND.

It is clear in the present case that Petitioner did not assert the alleged constitutional violation raised by his petition prior to his filing an application for certiorari in the Supreme Court of Georgia. Respondent recognizes that the presumption was not presented by any court until the decision was rendered by the Georgia Court of Appeals affirming Petitioner's conviction. Petitioner had the opportunity to raise the constitutionality of the presumption in his motion for rehearing to that court, but did not do so.

The issue was raised for the first time in the Supreme Court of Georgia. No opinion was rendered by that court when it denied the petition. No opinion was given when the Supreme Court denied the motion for reconsideration. It is well-recognized by this Court that where the highest court of a state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review an alleged federal constitutional question. Stembridge v. Georgia, 343 U.S. 541, 547 (1952). This Court has held that it would not take jurisdiction on a petition for certiorari when the question of the existence of an adequate state ground was debatable.

Respondent asserts that in the case at bar, the Supreme Court of Georgia could have denied the application based on a state ground without

considering the federal constitutional issue. The court could reasonably have determined that the Petitioner had not properly presented the issue for review by the Court of Appeals at his earliest opportunity to do so, that is, on his motion for rehearing in that court. The Georgia court could also have determined that the presumption did not affect Petitioner's conviction, but only served to reverse the conviction of Petitioner's wife. Under this reasoning, the presumption did not contribute in the least to Petitioner's present conviction and sentence. As the presumption was not even used by the trial court and was mentioned for the first time on direct appeal, it is clear that neither the jury nor the trial court used the presumption to find the Petitioner guilty.

Respondent asserts that it can be found that the Supreme Court of Georgia did not consider

the equal protection argument presented at this time by the Petitioner. The court could have determined that there was not a proper and timely presentation of this issue or that it did not contribute to Petitioner's conviction. Thus, this Court should decline to grant certiorari to review this issue as there might have been a nonfederal ground to support the judgment of the Supreme Court of Georgia.

C. A COURT-ESTABLISHED REBUTTABLE PRESUMPTION CONCERNING POSSESSION OF CONTRABAND DOES NOT CREATE A CLASSIFICATION SUBJECT TO SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Assuming this Court determines that Petitioner does have standing and that the issue presented by the petition is properly raised, Respondent submits that Petitioner has not shown that the courts of Georgia have set up an impermissible classification in violation of the equal protection clause. Respondent submits that the presumption attacked in the case at bar is merely a court-established rebuttable presumption and not a classification.

Petitioner is attacking in the instant petition the presumption used by the Georgia Court of Appeals that contraband found in the home belongs

to the head of the household and that the head of the household is presumed to be the husband unless otherwise shown. Goode v. State, 130 Ga. App. 791, 204 S.E.2d 526 (1974). As shown by the language used in the decision of the Court of Appeals, this is merely a presumption of law established by the courts of Georgia. The presumption is clearly rebuttable.

The cases relied upon by the Petitioner in his equal protection analysis clearly relate to statutory classifications created by legislatures in various states. These classifications do more than establish rebuttable presumptions, they establish distinct classifications of persons that are not subject to rebuttal or contradiction. In these situations, an individual is not presented with an opportunity to show that the classification is inappropriate unless he challenges

the constitutionality of the classification. In the presumption set out in the instant case, there is no classification.

A presumption differs from a classification in many respects. A presumption of law is merely a rule that courts and judges should draw a particular inference from a particular fact or set of facts until the presumption is shown to be untrue. A classification is a specific grouping into classes or an arranging of persons into different categories. Black's Law Dictionary 315-316, 1349 (4th Ed. 1951). Under these definitions, it is clear that the Georgia courts have not set out any sort of classification in the instant case, but have merely established a presumption of law which the courts are allowed to infer from particular facts. Before this presumption can even be applied, it must be shown that the

person to whom the presumption is applied could be considered the head of the household. The courts then presume that the head of the household is in possession of contraband found in the home as the head of the household is normally the individual either owning the home or paying the rent. In the instant case, the Petitioner admitted in his brief to the Court of Appeals that he was the head of the household. Therefore, the court presumed that he was in possession of the marijuana. As noted previously, this would not be sufficient to uphold the conviction for intent to distribute, but the court did find other evidence to support the conviction. As to the cocaine found in the bedroom closet, the court used the presumption to find that there was evidence to show that the Petitioner did possess the cocaine. The presumption was merely one portion of the case

against the Petitioner. The court noted that there was other evidence that would support a finding that some of the contraband belonged to the Petitioner.

As it has been shown that the presumption challenged is not a classification by gender, but a presumption of law, Respondent submits that as such, it is not subject to the equal protection challenge presented by the Petitioner. The presumption does not classify individuals, but merely makes a presumption based on a set of facts which can be rebutted. In the cases cited by the Petitioner, the legislatures have gone further and established rigid classifications in which individuals similarly situated are treated differently without any opportunity to rebut the effect of the statute. See e.g., Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975); Reed v. Reed, 404 U.S. 71 (1971).

Thus, Respondent submits that the presumption attacked in the instant case does not create a classification that is violative of the equal protection clause, but merely sets up a rebuttable presumption for use by the courts. This presumption has a rational basis for the inference that is drawn from a particular set of facts. Thus, there have been no violations of Petitioner's federal constitutional rights under the fourteenth amendment.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Robert L. Wright.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States Mail with proper address and adequate postage to:

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This 12th day of September, 1980.

/s/
JOHN C. WALDEN